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JAMES H. McKENN

# Supreme Court of the United States

**OCTOBER TERM, 1906.**

**No. 149.**

JAY DELAMETER, *Plaintiff in Error*,

vs.

THE STATE OF SOUTH DAKOTA,

*In error to the Supreme Court of the State of South Dakota.*

**Brief for Plaintiff in Error.**

HERBERT JACKSON,
*Attorney.*

# AUTHORITIES CITED.

*Statement of the Case.*

SECTIONS 2834, 2836, 2838, 2852, of the Revised Political Code of South Dakota.
SESSION LAWS, South Dakota, 1901, 238, &c.

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**Was the Statute a Restriction or Regulation of Interstate Commerce?**

*Liquor is a Legitimate Subject of Interstate Commerce.*

Leisy v. Hardin, 135 U. S., 100, 110.
In re Rahrer, 140 U. S., 545.
Rhodes v. Iowa, 170 U. S., 412, 414;
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*The Statute Complained of is a Direct Interference with Interstate Commerce.*

Bowman vs. Chicago & Northwestern Ry. Co., 125 U. S., 465, 524.
Robbins v. Taxing District of Shelby County, 120 U. S., 489-502.

Corson v. State of Maryland, [illegible] U. S., 502, 506.
Brennan v. City of Titusville, [illegible] U. S., 289, 308.
Caldwell v. North Carolina, 187 U. S., 622, 624.
Norfolk & Western Ry. Co. v. Sims, 191 U. S., 441, 451.
Rhodes v. State of Iowa, 170 U. S., 412-438.
Vance v. Vandercook Co., 170 U. S., 438, 468.
American Express Co. v. State of Iowa, 196 U. S., 133, 146.

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**Was the Regulation Imposed by Section 2834 of the Revised Political Code of South Dakota a Tax on Interstate Commerce?**

Robbins v. Taxing District of Shelby County, 120 U. S., 489, 502.
Session Laws, South Dakota, 1901, p. 246.
Caldwell v. North Carolina, 187 U. S., 622, 633.
American Express Co. v. Iowa, 196 U. S., 133, 146.

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**Was Section 2834 of the Revised Political Code of South Dakota a Police Regulation?**

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American Express Co. v. Iowa, 196 U. S., pp. 133-146.
Cook v. Marshall County, 196 U. S., 261, 275.
Schollenberger v. Penn. 171 U. S. pp. 1-30.

# Supreme Court of the United States.

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JAY DELAMETER,
*Plaintiff in Error,*

*Vs.*

THE STATE OF
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*Brief for Plaintiff in Error.*

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## STATEMENT OF THE CASE.

By an Act of the Legislature of the State of South Dakota, known as Section 2834, of the Rev. Pol. Code, it is provided:

> "In all townships, precincts, towns and cities of the State, there shall be annually paid the following license . . . upon the business of selling or offering for sale any spirituous, vinous, malt, brewed or other intoxicating liquor at retail . . . $400.00 per annum; upon the business of selling or offering for sale any of the above-mentioned liquors at retail

by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons $200.00 per annum." (See page 1 of the Record.)

By Section 2836, of the Rev. Pol. Code, it is further provided:

"Every person engaged or intending to engage in any business mentioned in Section 2834, and requiring payment of any license mentioned in such section shall . . . pay to the County Treasurer, in advance, the license required by Section 2834 for such business for a year, commencing on the 1st day of July and ending on the thirtieth day of June next thereafter." (See pages 36 and 37 of the Record.)

And by Section 2838, Rev. Pol. Code, it is further provided:

"If any person or persons shall engage or be engaged in any business requiring the payment of license under Section 2834 without having paid in full the license required by this Article . . . shall be punished by a fine of not less than $50.00 nor more than $500.00, and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days, or by both such fine and imprisonment in the discretion of the court." (See page 37 of the Record.)

And by Section 2852 of the Rev. Pol. Code, it is further provided:

"All persons engaged in the selling, or keeping for sale, of any of the liquors mentioned in this article, whether as owner or as clerk, agent, servant or employe, shall be equally liable as principals, for any violation of the provisions of this Article."

On the 29th day of March, 1904, in the Circuit Court of the Sixth District of the State of South Dakota, an information was filed by Samuel M. Howard, State's Attorney for the county of Potter, charging the plaintiff in error, Jay Delameter, with vio-

lating the provisions of Section 2834, of the Revised Political Code of the year 1903 of the state of South Dakota, in that said Delameter, whose business consisted, in whole or in part, of unlawfully selling, or offering for sale, spirituous, vinous, malt, brewed, fermented or other intoxicating liquors, as a traveling salesman, did on the 10th day of February, 1904, in the county of Potter, state of South Dakota, then and there unlawfully solicit orders for such intoxicating liquors by the jug, bottle or other vessel, in lots of less quantity than five gallons of each at one time, and without first having paid the license to said county of Potter, or to the treasurer thereof, as required by Section 2834, of the Revised Political Code, and that said Delameter had not paid any license to any township, precinct, town or city, etc. (See page 11 of the Record.)

Thereafter, the defendant appeared, waived examination, and demurred to the information on the ground "that the facts stated in said information did not constitute a public offense," which demurrer, after argument, the Circuit Court overruled. (See page 13, of the Record.)

The defendant entered a plea of "not guilty " and the action proceeded to trial.

The only witness introduced was the plaintiff in error, Jay Delameter, who testified as follows:

> "That the defendant, Jay Delameter, is now, and was on the 10th day of February, A. D., 1904, a traveling salesman, employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co., are residents of the city of St. Paul, in the state of Minnesota, and that said Lewis L. Metzger & Co. have their place of business at the said city of St. Paul, and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the 10th day of February,

A. D., 1904, Jay Delameter, as such employe, was engaged as said traveling salesman, in soliciting proposals or orders for said Lewis L. Metzger & Co., for the sale of intoxicating liquors, in quantities less than five gallons, from citizens and residents of and within the county of Potter, and state of South Dakota, who were not merchants, traders or dealers in intoxicating liquors. That on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross, who were not merchants, traders or dealers in intoxicating liquors, at and in the county of Potter, and the state of South Dakota, soliciting or requesting proposals or orders from said last-named persons, for the sale to them, by Lewis L. Metzger & Co., of said intoxicating liquors. That the said proposals and orders were procured for defendant from said last-named persons, forwarded to his principal, the said Lewis L. Metzger & Co., in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co., and said proposals or orders were forwarded with the understanding that they were subject to the approval of the said Lewis L. Metzger & Co., and that the defendant had no power or authority to approve said proposals or orders, nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co., said proposals or orders were conditioned that the said whiskey so ordered, should be delivered to the said Ferdinand Renner and Paul Gross, hereinbefore named, f. o. b. cars at the city of St. Paul, in the state of Minnesota. That the said Ferdinand Renner and Paul Gross, hereinbefore named, were to pay the freight from the city of St. Paul, in the state of Minnesota, and were to make remittance of the purchase price of said goods, to said Lewis L. Metzger & Co., at the city of St. Paul, in the state of Minnesota, within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid

any license to the county of Potter or state of South Dakota, or to the treasurer, or to any one, as required by Section 2834, of the Revised Political Code, of the year 1903, of the state of South Dakota, and that the said defendant had not then and there, and never has paid any license or fee whatsoever to any township, precinct, town or city within the said county or state, and that said liquor therein sold was intoxicating liquor, to wit: whiskey, and was not a proprietary patent medicine, and that the said defendant is not now, and never has been, a licensed pharmacist, under the laws of the state of South Dakota" (See pages 13 and 14, of the Record.)

The plaintiff in error, at the conclusion of the testimony, moved the court to advise the jury to return a verdict for defendant (plaintiff in error) for the reason that it appeared from the uncontradicted testimony that no sale was made within the state of South Dakota, and for the further reason that the statute under which the prosecution was brought was unconstitutional and void, because it conflicted with Section 8 of Article I of the Constitution of the United States, and this transaction being an interstate transaction, which motion was overruled by the court (See page 14, of the Record).

The plaintiff in error, as a result of the trial, was found guilty, as charged in the information (See page 14, of the Record), and thereupon filed a motion in arrest of judgment, urging the same grounds as previously urged on the motion requesting the court to direct a verdict, which motion was overruled (See page 15, of the Record).

Thereupon, the plaintiff in error filed a motion for a new trial, setting up the same grounds as theretofore urged on the previous motion, and also other grounds, which motion was

overruled by the court, to which order the plaintiff in error excepted. (See page 16, of the Record.)

Thereupon, the court pronounced judgment upon the plaintiff in error, and directed him to pay a fine of two hundred and fifty ($250.00) dollars, and in default of payment, sent him to the county jail of Potter county, for one hundred and twenty-five (125) days, to which sentence and judgment plaintiff in error excepted (See page 17, of the Record).

The plaintiff in error afterwards filed his assignment of errors, urging particularly the unconstitutionality of the judgment and proceedings, and asserting that they were all contrary to Section 8 of Article I of the Constitution of the United States (See pages 17 and 18, of the Record).

Such proceedings were had that the citation upon the assignment of errors duly issued and was made returnable before the Supreme Court of the state of South Dakota, at its April Term, 1904. The cause was duly argued and brought before the highest tribunal of the state of South Dakota, and on August 22, 1905, the judgment of the Circuit Court was affirmed (See page 30, of the Record).

The court will notice that the Supreme Court of the state of South Dakota was divided in its opinion. Haney, J., being of opinion that the judgment should be reversed and a new trial ordered (See pages 31 to 36, of this Record), and Corons, P. J., and Fulton, J., being of opinion that the judgment should be affirmed (See pages 36 to 41, of this Record).

Thereafter, the plaintiff in error filed its petition for a writ of error, and the same was duly allowed (See page 42, of this Record).

Said petition in error and assignment of errors appear in full on pages 42, 43, 44, and 45, of this Record.

## SPECIFICATION OF ERRORS RELIED ON.

Plaintiff in error relies upon the following errors, and urges that because thereof there should be a reversal of the judgment of the Circuit Court of Potter County and the Supreme Court of South Dakota, to-wit:

*"First:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state, on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, are not in conflict with and in violation of Section 8, of Article I, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

*"Second:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, do not constitute regulations and restrictions on commerce between the several states.

*"Third:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of

other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, do not constitute a tax upon commerce between the several states.

*"Fourth:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, was within the police power of the Legislature of the state of South Dakota.

*"Fifth:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, making it unlawful for the plaintiff in error to carry on his business as a traveling salesman of and for a citizen, or citizens, of other states than the state of South Dakota, and having and maintaining no office or place of business within said state of South Dakota, without taking out a license from said state and paying the license fee provided by said laws, was within the police powers of the Legislature of the state of South Dakota.

*"Sixth:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling sales-

men engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, was not in conflict with, and in violation of, the provisions of the Fourteenth Amendment of the Constitution of the United States, for that the state of South Dakota, by and through the provisions of said laws, assumes and seeks (1) to deprive the plaintiff in error, and certain other citizens of the United States, and of the state of South Dakota, of rights, privileges and immunities secured to other citizens of the United States and of the said state; and (2) to deprive and deny to the plaintiff in error, and certain citizens and persons within the jurisdiction of the state of South Dakota, the equal protection of the law.

*"Seventh:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, are not in conflict with, and in violation of, the provisions of Section 2, of Article 4, of the Constitution of the United States.

*"Eighth:* The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the State of South Dakota, and having no residence or place of business in said state of South Dakota, do not discriminate between citizens of South Dakota and citizens of other states.

*"Ninth:* The court erred in affirming the judgment of conviction.

*"Tenth:* The court erred in failing to render judgment that the laws on which plaintiff in error was convicted, were illegal, as contrary to the Constitution of the United States, and that the judgment of conviction should be reversed."

The errors shown by the record seem to raise the following

QUESTIONS:

*First:* Was the Act of the Legislature of South Dakota, known as Section 2834, of the Revised Political Code, a **regulation** or a **restriction** of Interstate Commerce, and because thereof, void?

*Second:* Was the regulation imposed by Section 2834 of the Revised Political Code of South Dakota a **tax** on Interstate Commerce?

*Third:* Was it within the **police power** of the state of South Dakota to pass a law such as Section 2834 of the Revised Political Code?

I will take the questions up in the order above set out.

# ARGUMENT.

## WAS THE ACT OF THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA A REGULATION OR RESTRICTION OF INTERSTATE COMMERCE?

The Act in question, known as Section 2834, of the Revised Political Code of South Dakota, is as follows:

> "In all townships, precincts and cities of this state there shall be annually paid, the following license upon the business of selling, or keeping for sale, by all persons whose business, in whole or in part, consists in selling, or offering for sale in this state, distilled, brewed or malt liquors, or mixed liquors, as follows: * * * *upon* the business of *selling, or offering for sale,* any of the above-mentioned liquors at retail, by any traveling salesman, who solicits orders by the jug or bottle, in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business," etc. * * *

The court will notice that the license tax is imposed upon "the business of selling, or offering for sale, any of the above-mentioned liquors."

A glance at the statute shows that if liquor be a subject of interstate commerce that the Article under which the plaintiff in error was convicted must necessarily be a regulation of interstate commerce. Therefore, we will consider (*a*) is liquor a legitimate subject of interstate commerce; and (*b*) did the Act complained of directly, or indirectly, interfere with such commerce?

**Liquor is a Legitimate Subject of Interstate Commerce.**

In *Leisy* v. *Hardin*, 135 U. S., 100, 110, this court said:

> "Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which the right of traffic exists, and are so recognized by the usages of the commercial world."

In *Re Rahrer*, 140 U. S. 545, this court said:

> "Unquestionably, fermented, distilled, or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between state and state, like any other commodity in which the right of traffic exists, and are recognized by the usages of the commercial world, the laws of Congress and the decisions of courts."

And again in *Rhodes* v. *Iowa*, 170 U. S., p. 414:

> "The sole question presented for consideration is whether the statute of the state of Iowa can be held to apply to the box in question, whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee, at the point to which it was consigned. That is to say, whether the law of the state of Iowa can be made to apply to a shipment from the state of Illinois, before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States."

After a thorough discussion, the court held the Iowa statutes unconstitutional.

The principle enunciated in the foregoing cases is also followed in

*Bowman* v. *Railway Co.*, 125 U. S., 465;

**The Statute Complained of is a Direct Interference with Interstate Commerce.**

It is clear, beyond doubt, that liquor is a legitimate subject of interstate commerce, and it is equally clear, that the Act of the Legislature of South Dakota interfered with such commerce.

It is well settled in the case of

*Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S., 465-524;

that the Act of the Iowa Legislature, forbidding any common carrier to bring within that state, intoxicating liquors, from any other state or territory, without first having a certificate required by the Act, is a regulation of commerce among the states, and is void, as repugnant to the Constitution of the United States.

The court, through Mr. Justice Matthews, said, *Ibid.*, 493:

> "It is conceded, as we have already shown, that for the purposes of its policy, a state has legislative control, exclusive of Congress, within its territory, of all persons, things and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture, within its limits, of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states, or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It *can not*, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable such a regulation might be."

In the case at bar, the traveling agent was taking an order or proposal for merchandise in the state of South Dakota. The proposal was to be sent to the principal in Minnesota, and, if accepted, the goods were to be shipped f. o. b. cars, St. Paul, Minnesota. No money was to be paid to the agent, as he had no authority to receive any (See page 13, of this Record), but, on the other hand, the money was to be sent to the principal at St. Paul, Minnesota. How would it be possible to present a plainer interstate transaction? This was truly interstate commerce, as defined by Article 1, Section 8, of the Constitution. And for the state to interfere with it was a direct attempt "to regulate commerce" among the several states.

The court will notice that there was no attempt at re-sale in South Dakota, in that, in fact, no *merchandise was ever delivered* —so there was no transaction of any kind that the state could assume jurisdiction over. The entire transaction being completed in Minnesota, and it being plainly a Minnesota contract, and nothing was done in South Dakota to in any way change the rule.

In the case of

*Robbins* v. *Taxing District of Shelby County*, 120 U. S., 489, 502;

the court settled the question of the right of the state to interfere. The facts in the case are identical with the case at bar, except that Robbins, the plaintiff in error, was soliciting orders for paper in Tennessee, for a non-resident principal in Ohio, while in this case, Delameter, the plaintiff in error, was soliciting orders for liquor in South Dakota for a non-resident principal in Minnesota. The court said, *Ibid.*, 497:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. *Interstate commerce can not be taxed at all, even though the same amount of tax should be laid on domestic commerce,* or that which is carried on solely within the state. This was decided in the State Freight cases (*supra*). The negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant can not be taxed there for ordering goods from London or New York, because in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress, alone."

And again, the court says, *Ibid.*, p. 498:

"If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the state, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And *Congress, alone, can do it;* for it is obvious that such regulations should be based on a uniform system, applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."

To the same effect is

*Corson* v. *State of Maryland,* 120 U. S., 502, 506.

A tax of the character imposed by the Legislature of South Dakota was a direct interference with interstate commerce; and the result plainly shows that it absolutely deprives the resident of

another state from attempting to sell his goods, because the South Dakota Act complained of not only requires one license for the entire state, but requires a license in every "township, precinct, town and city," thereby absolutely preventing a non-resident from doing business, as the amount of the license fees would be more than the amount of the business transacted. This court has held this illegal and contrary to the commerce clause of the Constitution so often that it is almost a worn out question, but nowhere has it been so definitely settled as in the case of

*Brennan* v. *City of Titusville*, 153 U. S., 289, 308.

The court, through Mr. Justice Brewer (pp. 297, 298), said:

> "The question in the case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods.
>
> "It is true in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the state can tax for the privilege of selling to one class it can for selling to another, or to all. In either case, it is a restriction on the right to sell, and a burden on lawful commerce between citizens of two states. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at dwelling house, is merely a regulation of commerce."

The case of

*Caldwell* v. *North Carolina*, 187 U. S., 622, 624,

was a much stronger case against the plaintiff in error than the one at bar. In that case the merchandise was shipped into the state of North Carolina to the order of the seller, and an agent of the seller was sent to North Carolina, and this agent secured the merchandise in bulk, broke the package and delivered same to the purchasers. In the present case the agent for Lewis L. Metzger & Co. simply secured the order in South Dakota and then forwarded the same to his principal, and the principal delivered the goods f. o. b. cars at St. Paul, Minnesota. No step was taken in South Dakota, except to take the order.

In the Caldwell case (*Ibid.*, p. 633), the court (through Mr. Justice Shiras) said:

> "Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.
>
> It can not escape observation that efforts of this kind, in the interest of the states where the purchasers reside have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation." *Ibid.*, pp. 632, 633.

The latest expression of the court, and one which, we think, settles beyond peradventure the question of the right of the state to interfere with commerce of the character the plaintiff in error was engaged in, is the case of

*Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S., 441, 451.

On page 446, *Ibid.*, the court, through Mr. Justice Brown, says:

> "To the ordinary mind it seems a somewhat startling proposition that a manufacturing corporation, located and doing its main business in a distant city, having no manufactory in North Carolina, no stock in trade, no place for the sale of its goods there, and no agent authorized to sell them, can be compelled to take out a license required of all those "engaged in the business of selling," from the mere fact that it had done what hundreds of others were doing daily—sent a single machine there upon a written order of a customer, and under an ordinary C. O. D. consignment. If this may be done the revenues of every state may be largely increased by adopting a similar system, since a large part of the business of retail shops in the principal cities is done by orders received, filled and the goods delivered in the same way. Of course, it is impossible to estimate the number of business houses in other states which are accustomed to collect their accounts in this manner.
>
> "If this were the law, it would also follow that the consignor of every cargo of wheat sent to New York for export under a bill of lading, accompanied by a draft for the payment of the money in the usual method, might be compelled to take out a license in the state of New York as a dealer in produce, notwithstanding that all the real business was done in Chicago or North Dakota.
>
> "So, too, what the state may do directly, it may authorize its municipalities to do, and if, under legislative sanction, each of the large towns in the state of North Carolina saw

fit to adopt a similar license tax, the consequence would be, not a simple interference with interstate commerce, but a practical destruction of one important branch of it.

"While it may be entirely true that the property in the things sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet, as a matter of fact, the bargain is made, and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof.

"A sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell, and its acceptance. That possession shall be retained until the payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction, except in connection with the prior agreement to sell, although, in certain cases arising under the police power, it has been held that the sale is not complete until delivery, and sometimes not until payment. Were it not for the opinion of the Supreme Court of the state of North Carolina, we should have said that the words "engaged in the business of selling the same within the state," had reference to the word "selling" in its popular and ordinary sense of selling from a stock on hand, or upon a special order to a manufacturer, and not to a mere method of collecting the money; but, however this may be, it is evident the state courts could not give to it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling."

* * * * * * * * * * * * * * * * *

Therefore, it is apparent that the court in this case had no right to interfere unless liquor stands in a different category from other articles of merchandise by virtue of what is known as the Act of Congress of August 8, 1890, known as the Wilson Bill.

This, we insist, is not the case, and this court has repeatedly so decided.

In the case of

*Rhodes* v. *State of Iowa*, 170 U. S., 412-438.

this court through Mr. Justice White very thoroughly analyzed what is known as the Wilson Bill, and holds that the Act of Congress of August 8, 1890, does not apply to shipments, except when they shipped into a state for re-sale. After discussing the phraseology of the Act, the court said, Ibid., p. 423:

> "If it had been the intention of the Act of Congress to provide for the stoppage at the state line of every interstate commerce contract relating to the merchandise named in the Act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods 'into any state or territory for use, consumption, sale or storage therein,' negatives the correctness of the interpretation holding that the receipt into any state or territory for the purposes named could never take place. Light is thrown upon the purpose and spirit of the Act by another consideration. The Bowman case was decided in 1888, the opinion in *Leisy* v. *Hardin* was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by an interstate shipment only after the consummation of the shipment, but before the sale of the mer-

chandise, that is, that the one receiving merchandise of the character named, whilst retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in *Leisy* v. *Hardin* had just previously declared to exist.

"This view gives meaning and effect to the language of the act providing that such merchandise 'shall not be exempt therefrom' (legislative power of the state) by reason of being introduced therein in 'original packages or otherwise.' These words have no place or meaning in the act, if its purpose was to attach the power of the state to the goods before the termination of the interstate commerce shipment. The words 'original packages' had, at the time of the passage of the Act by the decisions of this court, acquired with reference to the construction of the Constitution, a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a state by the receiver thereof, although state laws might forbid the sale of merchandise of like character not in such packages.

"While it is true that the right to sell free from state interference, interstate commerce merchandise was held in *Leisy* v. *Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. The purpose of Congress to submit the incidental power to sell to the dominion of state authority, should not without the clearest implication,

be held to imply the purpose of subjecting to state laws, a contract which in its very object and nature, was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed."

The court then goes on to show by authority that it was never intended to give the various states any control over interstate transactions, except for re-sale purposes.

Perhaps a stronger case, and one more like the case at bar is that of

*Vance* v. *Vandercook Co.*, 170 U. S., 438-468.

It appears that in this case appellee, a California corporation, was the owner of large vineyards in California, from which it produced large quantities of brandies, etc.; that through its traveling agent it took orders from certain residents of South Carolina to deliver to each of them certain original packages of wines and brandies, and seventy-three packages in one case were actually shipped, and the authorities of South Carolina seized the packages, and the court held the seizures were illegally made, contrary to the interstate commerce clause of the Constitution, and not warranted by the Wilson Bill.

The points of similarity between the Vandercook case, *Ibid.*, and the case at bar are many. The firm for which plaintiff in error traveled in Minnesota, sent its agent to South Dakota to secure orders and these orders to be delivered f. o. b. cars St. Paul, Minn., and the state authorities arrested the agent. In the case cited, *Ibid.*, the state authorities confiscated the goods. The result remains the same, except in the case at bar the man's liberty was involved, and in the case cited merely the merchandise. One method just as surely as the other, destroys the

interstate commerce, and prevents the freedom of trade which should exist between the various states. In the Vandercook case, the court said:

> "But the weight of the contention is overcome when it is considered that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the Act of Congress which allows state authority to attach to the original packages before sale, but only after delivery. *Scott* v. *Donald,* and *Rhodes* v. *State of Iowa, supra.* It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use. This demonstrates the unsoundness of the contention that if state agents are the only ones authorized to buy liquor for sale in a state, and they select the liquor to be sold from particular states, the product of other states will be excluded. They can not be excluded if they are free to come in for the use of any resident of South Carolina who may elect to order them for his use. The products of other states will be, of course, excluded from sale in the original packages in the state, but as the right of the state to prevent the sale in original packages of intoxicants coming from other states, in consequence of the state law, forbidding the sale of any but certain liquor, attaches to the original packages from other states, by virtue of the Act of Congress, the inability to make such sales arises from a lawful state enactment. To hold the law unconstitutional because it prevents such sale in the original package would be to decide that the state law was unconstitutional, because it exerted a power which the state had a lawful right to exercise.

Indeed, the law of the state, here under review, does not purport to forbid the shipment into the state, from other states, of intoxicating liquors for the use of a resident, and if it did so, it would, upon principle, and under the ruling in *Scott* v. *Donald,* to that extent, be in conflict with the Constitution of the United States. It is argued, that the foregoing considerations are inapplicable since the state law now before us, whilst it recognizes the right of residents of other states to ship liquor into South Carolina for the use of residents therein, attaches to the exercise of that right such restrictions as virtually destroy it.

"But the right of persons in one state to ship liquor into another state, to a resident for his own use, is derived from the Constitution of the United States, and does not rest on the grant of the state law. Either the conditions attached by the state law unlawfully restrain the right or they do not. If they do—and we shall hereafter examine this contention—then they are void. If they do not, then there is no lawful ground of complaint on the subject."

In the case of the

*American Express Company* v. *State of Iowa,* 196 U. S., 133-146,

the court went even a step further, and held that liquor shipped C. O. D. from one state to another was interstate commerce; that the title of the goods passed when same was delivered to the carrier, and that any interference by the state authorities with the merchandise was illegal, unless the goods were offered for re-sale, and the court re-affirms the law as laid down in the many cases heretofore cited, and then says, *Ibid.,* pp. 143, 144, 145:

"Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. They rested, also, upon the obvious want of power of one state to destroy contracts concerning interstate commerce, valid in the states where made. True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding, that under such a shipment, the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price, and delivery to the consignee, at the point of destination.

"But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted inter-state commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to inter-state commerce made in such other state; and, indeed, would require us to go yet further, and say that, although, under the inter-state commerce clause, a citizen in one state had a right to have merchandise consigned from another state delivered to him in the state to which the shipment

was made, yet that such right was so illusory that it only obtained in cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment.

"When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not inter-state commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizens of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove from the protection of the inter-state commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of inter-state commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The vast weight of authority from *Gibbons* v. *Ogden*, 9 Wheat., p. 1, to the *American Express Company* v. *Iowa*, 196 U. S., 133, is so conclusive of the propositions involved in this case that there can be no question but that the action of the

authorities of South Dakota was void, because it was an effort to control inter-state commerce, and contrary to the provisions of Section 1, Article VIII., of the Constitution; and it also appears perfectly plain that no State Legislature can pass any such law to so regulate commerce between the states, without the authority of Congress first given, and that the Wilson Bill did not extend such authority; and, furthermore, it is a very doubtful proposition as to whether Congress can in any event delegate its control over inter-state commerce to the Legislature of the various states.

## WAS THE REGULATION IMPOSED BY SECTION 2834 OF THE REVISED POLITICAL CODE OF SOUTH DAKOTA A TAX ON INTERSTATE COMMERCE?

It is apparent that the license fee proposed to be charged by the state of South Dakota was a direct effort to levy a tax on liquor commerce—state and inter-state.

As stated in the case of

*Robbins* v. *Taxing District of Shelby County,* 120 U. S., 489, 502:

> "It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; while the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents; and if they had, they are not subject to any tax therefor. They are taxed for their licensed

houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition.

"And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon inter-state commerce, but that it is intended to have that effect as one of its principle objects. And if a state can, in this way, impose restrictions upon inter-state commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principle causes that led to it." *Ibid.*, 497.

In the case at bar the entire question of whether or not the entire Act of the Legislature is a police regulation or merely a method of raising revenue is clearly settled by the Legislature itself.

The original Act fixing the license tax was passed by the Legislature at its session in 1901, and does not in any manner prohibit the sale of liquor, but simply fixes the license fees. At the same session and within a few days after its passage, an Act amending the section of the original Act, fixing the license fees, was passed as follows:

"CHAPTER 144.

*"Relating to the Manufacture and Sale of Intoxicating Liquors.*

"An Act to amend Section 7 of Chapter 72 of the Ses-

sion laws of 1897, being an Act regulating the manufacture and sales of intoxicating liquors.

"Be it enacted by the Legislature of South Dakota:

*"Amendment.*

"SEC. 1. That Section 7 of Chapter 72 of the Session Laws of 1897, the same being an Act relating to the sale of intoxicating liquors, entitled 'An act to provide for the licensing, restriction and regulation of the manufacture and sale of spirituous and intoxicating liquors' be amended to read as follows:

"SEC. 7. *Duty of County Treasurer.* All moneys received by any county treasurer under Section 1 of this Act shall be by him placed to the credit of the general fund of the county.

"SEC. 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

"Approved, February 14, 1901."

See Session Acts South Dakota, 1901, p. 246.

This makes plain the object of the Legislature—merely the raising of revenue.

The claim that the tax imposed was an "occupation tax" and, therefore, allowable, although it affected inter-state commerce, is answered by this court in the case of

*Caldwell* v. *North Carolina,* 187 U. S., 622, 633.

On pages 627 and 628 the court, through Mr. Justice Shiras, says:

"*Asher* v. *Texas*, 128 U. S., 129; 32 L. Ed., 368; 2 Inters. Com. Rep., 241; 9 Sup. Ct. Rep., 1, was a case where a state statute required from 'every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax," and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another state. The same doctrine was held in *Stoutenburgh* v. *Hennick*, 129 U. S., 141; 32 L. Ed., 637; 9 Sup. Ct. Rep., 256, in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an Act of the Legislature Assembly of the District of Columbia.

"In *Lyng* v. *Michigan*, 135 U. S., 161; 34 L. Ed., 150; 3 Inters. Com. Rep., 143; 10 Sup. Ct. Rep., 725, the general proposition was repeated:

" 'We have repeatedly held that no state has the right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason, that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"In *Crutcher* v. *Kentucky*, 141 U. S., 47; 35 L. Ed., 649; 11 Sup. Ct. Rep., 851, an act of the state of Kentucky which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business without first obtaining a license from the state, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, said:

" 'The character of police regulation, claimed for the requirements of the statutes in question, is certainly not such as to give them a controlling force over the regulations of

inter-state commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon inter-state, any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.'"

In the case at bar no goods were shipped, so far as the record shows—the tax is for soliciting the orders.

It has been well settled that in such cases as the one at bar the sale does not take place in South Dakota but in Minnesota.

See

*American Express Company* v. *Iowa,* 196 U. S., 133-146.

In this case it is clear that no title passed to the goods proposed to be sold because the principal reserved the right to accept or reject the orders—the goods being sold on sixty days time, and the principal reserving the right to say who he would trust. The money at the end of sixty days was to be sent to St. Paul. (See page 13 of this Record.)

## WAS SECTION 2834 OF THE REVISED POLITICAL CODE OF SOUTH DAKOTA A POLICE REGULATION?

We have shown heretofore that the Act of the Legislature of the State of South Dakota was not a regulation in the interest

of the morals of the community—that its only purpose was to license and raise revenue. So it is true that it is not a police regulation. There is nothing in the record anywhere which indicates that the Act proposed to be enforced was for the betterment or the morals or the safeguarding of the health or wellfare of the community.

In other words, the case does not come within the rule laid down in the case of

*Austin* v. *Tennessee*, 179 U. S., 343, 388.

In the case just cited, it was clearly a police regulation. See statement of case by Mr. Justice Brown, p. 343.

In the case at bar, however, there is no such state of affairs or facts. It appears that orders were taken for a less quantity than five gallons—that these goods were to be shipped by freight directed to the purchaser. In the Austin case the packages were of insignificant size and value, and the court expressly says, p. 344:

> "We are not disposed to question the general principle that the states can not, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless (*Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862, 3 Inters. Com. Rep. 485; 11 Sup. Ct. Rep. 213), or otherwise burden foreign or inter-state commerce by regulations adopted under the assumed police power of the state, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. Passenger cases 7 How. 283, 12 L. Ed. 702; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Henderson* v. *New York*, 92 U. S. 259, sub nom.; *Henderson* v. *Wickham*, 23 L. Ed.

543; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. Ed. 527; *Guy* v. *Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *Ward* v. *Maryland*, 12 Wall. 418, 20 L. Ed. 449; *New York* v. *Campagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383, 2 Sup. Ct. Rep. 87. In this connection we indorse fully what was said by this court in the case of *Mugler* v. *Kansas*, 123 U. S. 623, 661; 31 L. Ed. 205, 210; 8 Sup. Ct. Rep. 273: 'If therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' "

This entire decision is based upon the ground as stated by the court (pp. 344, 345), that the packages were not legitimate subjects of commerce because of their character. In this case it appears that the merchandise was to be shipped by freight. From its very nature, the court must presume that before the railroad company would receive the goods they must be properly boxed and packed—and being brittle necessarily cased in wood. The court must also presume that the package was of considerable size, otherwise the freight charges between the points mentioned would amount to more than its value.

In the Austin case it appeared the goods were in small boxes a few inches long and broad and containing articles of small value. There is nothing of the kind indicated here.

This court knows that five gallons of whiskey is a valuable article of commerce, and that its probable value will not be less than fifteen dollars, (the Government tax alone being $5.50) and probably nearer thirty dollars. If the state can, under the police regulation keep out a package of this character—it could under

the same cloak make it ten, or fifteen, or any other number of gallons and thereby nullify all the decisions of this court regulating inter-state commerce.

This court has recognized a $3.85 shipment of liquor as inter-state commerce.

See

*American Express Company* v. *Iowa,* 196 U. S., 133-146.

This shipment was in fact only a gallon shipment. Will the court now say that a shipment five times as large as this was within the power of the state to stop?

If Congress thought it best for the state to control the liquor traffic it could have said so, but in the passage of the Wilson Bill it simply gave power to stop re-sale, and now the states are asking this court, under the guise of police power, to do what Congress has refused.

The case of

*Cook* v. *Marshall County,* 196 U. S., 261, 275,

is a similar case to the Austin case, and the decision apparently turns on the character of packages.

The court must remember that a large portion of the retail trade of the county is now done by express, by mail, and by agents, and to permit the various states to regulate the trade will create as great confusion as existed in the days of the Confederation. These regulations must be by Congress, or not at all, and we respectfully insist that Congress alone can regulate.

However, this court has expressly held that a package of much less value than a four gallon package of whiskey is not the subject for interference by a state under the supposed police power, and in language especially fitting to the case.

See

*Schollenberger* v. *Penn.*, 171 U. S., pp. 1-30.

On page 24 the court says:

"We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package is not necessary to here determine. *We do say that a sale of a ten-pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth* in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the state. .*Waring* v. *The Mayor* (*Waring* v. *Mobile*), 75 U. S., 8 Wall., 110-122 (19: 342-346). The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it can not be supposed that he would be personally engaged in the sale of every original package sent to the different states in the Union. Having the right to sell through his agent, a sale thus affected is valid.

"The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumer or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not substantially prohibit the introduction of the pure article, and thereby interfere with inter-state commerce. It can not, for the purpose of preventing the introduction of

an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The Act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another state and its sale in the original package, as described in the special verdict, is invalid."

## CONCLUSION.

We respectfully submit that the record and authorities show:

*First:* That the Act of the State of South Dakota was a regulation of inter-state commerce.

*Second:* That said Act can not be sustained upon the theory that it is not a tax on inter-state commerce, because the record shows that it undoubtedly was.

*Third:* That said Act can not be sustained by any appeal to the police power of the state.

Therefore, we respectfully ask that the decision of the Supreme Court of South Dakota, and the decision of the Circuit Court of the Sixth Judicial District of South Dakota, be reversed, and the lower courts directed to dismiss the plaintiff in error from custody.

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